INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	15

CITATIONS

Cases:	
Abdo v. *Townshend*, 282 Fed. 476	14
Agnew v. *United States*, 165 U. S. 36	10
Cochran v. *United States*, 157 U. S. 286	9, 10
Coffin v. *United States*, 156 U. S. 432	9, 10
Fournier v. *United States*, 58 F. (2d) 3	14
Green v. *United States*, 154 Fed. 401	12
Holt v. *United States*, 218 U. S. 245	10
Litsinger v. *United States*, 44 F. (2d) 45	14
Patton v. *United States*, 281 U. S. 276	13
Porter v. *United States*, 91 Fed. 494	13
State v. *Hayes*, 162 La. 918	12
State v. *Rook*, 61 Kans. 382	12
State v. *Snyder*, 182 Mo. 462	12
Thompson v. *State*, 54 Miss. 740	12
United States v. *Brace*, 143 Fed. 703	12
United States v. *Cook*, 17 Wall. 168	12
United States v. *Ike Young*, 107 F. (2d) 490	14
United States v. *Murdock*, 284 U. S. 141	12
United States v. *Socony Vacuum Oil Co.*, 310 U. S. 150	13
United States v. *Trenton Potteries*, 273 U. S. 392	13
United States v. *White*, 5 Cranch 73	12
Miscellaneous:	
Thayer, *Preliminary Treatise on Evidence*, App. B, pp. 551–553	11
Wigmore on Evidence, Sec. 2511	11
34 A. L. R. 938	10
94 A. L. R. 1042	10

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1042

CLYDE NIMERICK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 283–290) is reported in 118 F. (2d) 464.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 9, 1941 (R. 291). The petition for a writ of certiorari was filed May 10, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court's instruction to the jury upon "presumption of innocence" adequately protected the defendant's rights, where the trial court did not employ the customary formula, but did charge that the return of the indictment and the circumstance of the accused's being on trial should not be considered as evidence of his guilt, and further charged that the Government's case must be established beyond a reasonable doubt.

2. Whether petitioner was deprived of a trial by jury on his defense of statute of limitations, where the trial court, without objection by defense counsel, heard testimony upon the issue in a preliminary hearing on petitioner's special plea in bar and ruled against the petitioner, and where petitioner was not denied an opportunity to retry the issue before the petit jury which convicted him.

3. Whether errors were committed in the admission of evidence, and if so, whether such errors were prejudicial in view of the overwhelming evidence of guilt.

STATEMENT

On February 14, 1939, two indictments were returned against the petitioner in the District Court of the United States for the District of Vermont, one charging him with armed robbery of the Caledonia National Bank at Danville, Vermont, on June 4, 1934 (U. S. C. Title 12, Section 588b), the other charging him with having conspired with

Edward Bentz and Avery Simons to rob the bank (U. S. C. Title 18, Section 88) (R. 1–5, 34–36).

The petitioner, by special pleas in bar, invoked the statute of limitations (R. 5–6, 37). The Government by replications alleged that the petitioner had been a fugitive from justice during the period between the commission of the offenses and the return of the indictments (R. 6–7, 38). At a preliminary hearing upon the issue thus formed, evidence was submitted to the court without a jury, and the trial court found that petitioner had been a fugitive from justice and that therefore the indictments were not barred (R. 1, 61–80).

Petitioner thereupon pleaded not guilty and proceeded to trial (R. 1, 81). On July 3, 1940, he was found guilty on both indictments (R. 1, 245) and was sentenced to twenty years imprisonment on the substantive indictment and two years on the conspiracy indictment, the sentences to run concurrently (R. 10–11, 41–42, 247). The judgments of conviction were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit (R. 291).

As the court below said (R. 286): "Evidence is rarely adduced in a case which so inevitably establishes guilt as did the proof here". In brief, the record shows:

The Caledonia National Bank of Danville, Vermont, was robbed on June 4, 1934, by Bentz and Simons while a third participant, the driver of

their car, waited outside (R. 82–93). Bentz and Simons had pleaded guilty and were confined in Alcatraz under sentence for their participation in this offense at the time the indictments in the present case were returned (R. 35, 165, 170). So much is undisputed (Pet. 8). Identification of the petitioner as the third participant was all that remained to be proved in the present case.

Government witness Doris Crane positively identified the petitioner as the man whom she saw standing outside the bank with his foot on the running board of the get-away car while the robbery was being committed and who drove off with the robbers (R. 124, 126, 134, 145).

The get-away car was a dark blue Ford with cream colored wheels bearing Massachusetts license plates with a number ending in "333" (R. 123, 166). Two witnesses testified that petitioner and Simons held them up at the point of a gun on May 30, 1934, at Gardner, Massachusetts, and stole a Plymouth car bearing Massachusetts license tag No. 462–333, which was found abandoned the next day with license plates missing (R. 94, 103). Witness Benoit testified that on the night of the Gardner holdup Nimerick, Bentz and another stopped to eat at his lunch counter in Winchenden, Massachusetts, ten or twelve miles from Gardner (R. 114–115). Petitioner was also identified as one of two men who stole a dark blue Ford with cream colored wheels in a machine gun holdup at Haverhill, Massachusetts, on June 1,

three days before the Danville robbery (R. 106–109). Theodore Bentz, brother of Edward Bentz, testified that he had seen Edward, Nimerick, and a third man drive out of Portland, Maine, on the night before the Danville robbery in a dark blue Ford or Chevrolet with light wheels (R. 160). A restaurant proprietor in Rochester, Vermont, a considerable distance south of Danville, identified Nimerick as the man who had entered his restaurant on the night of the bank robbery in the company of Edward Bentz and Avery Simons (R. 151–154).

The Government put Edward Bentz, the self-confessed participant in the Caledonia Bank robbery, on the stand. He testified (R. 166–167) that he and two others left Portland, Maine, on the night before the bank robbery, in a dark blue Ford sedan; that he and one of his companions entered the bank while the third stayed outside; and that after the robbery they drove from Vermont to New York along a route which took them through Rochester, Vermont. Bentz was not asked by the Government if petitioner was one of the participants in the bank robbery.

The cross examination of Bentz, after some preliminary inquiries, went into the subject of his acquaintance with Doris Crane, the eye witness who put Nimerick at the scene of the crime (R. 170–173). On objection by the Government, defense counsel was permitted to continue along this line by making the witness his own (R. 173, 180).

Thereafter Bentz testified that a "Smitty" was driving the robbery car and that petitioner was not "Smitty" (R. 174). On further examination by the Government, Bentz testified that the United States Attorney, Assistant United States Attorney Ryan, and Mr. Wood, an F. B. I. agent, interviewed him at the jail in advance of trial (R. 179) and that at that time he did not know whom they had as a defendant in the case (R. 183). He was asked if at that time, before he had an opportunity to view the defendant, he had stated, "I won't put the finger on anybody and you ought not to ask me to put the finger on anybody because of what it would mean to me when I get back to Alcatraz" (R. 181). He denied making such a statement (R. 181).

F. B. I. Agent Wood was then called to the stand and testified that Bentz had told them in the conference in the jail that "if he were asked if the man were with him on the job that he would not identify him, even though the man had been with him" (R. 191); that "in his opinion we should not ask him to identify the defendant, whom we had here," since he had had trouble at Alcatraz "trying to get along with the boys there" because they thought he had informed on Simons; and that "he thought he had cooperated with the Government enough so that he should not be asked to put the finger on him" (R. 190–191). Bentz was then assured that the Government would not ask

him to identify the third participant in the Danville holdup (R. 191). Wood also testified that though Bentz was constantly in contact with federal officers, he at no time even intimated that petitioner was not the right man (R. 191–192).

Assistant United States Attorney Ryan was also called to the stand and testified to the same effect, adding that when Bentz was told that petitioner was being held for the robbery, Bentz stated, "Why don't you try him for the Brandon job, you have got a better case against him" (R. 194–196). The jury was instructed to disregard this latter statement (R. 195).

The petitioner did not take the stand and witnesses called by him to discredit Doris Crane instead corroborated her in all essential particulars (R. 211–226). Indeed, Edward Bentz testified that he pleaded guilty because he "knew she was an eye-witness of the fact the car was outside the bank there that day—the day that it got away—that is, I saw her across the street" (R. 177).

ARGUMENT

I

Petitioner's first contention is that the trial court failed to instruct the jury that he was entitled to the presumption of innocence (Petition 21–27). The charge requested by the petitioner was as follows:

> * * * that the defendant is presumed to be innocent until proven guilty beyond a

> reasonable doubt and that this presumption is evidence in his favor and attends him throughout the trial, until such time is reached in the course of the trial—if that time is ever reached—when the jury find that this presumption has been removed or rebutted by competent evidence (R. 244).

The charge given by the trial court was in part as follows:

> The fact that this defendant is here under indictment and on trial is not to be taken against him. The indictments which have been found and on which he is being prosecuted are no evidence whatsoever of the defendant's guilt. They are simply accusations which charge him with the offenses, and no juryman should allow himself to be influenced in the least degree by that fact (R. 238).
>
> * * * * *
>
> The burden is upon the Government to make out every essential element of each case, and that the Government must do beyond a reasonable doubt. You cannot find the defendant guilty under either of the indictments unless from all of the evidence you believe him guilty beyond a reasonable doubt. * * *
>
> If, after an impartial consideration of all of the evidence, you can candidly say that you are not satisfied of the defendant's guilt, then you have a reasonable doubt and you should find him "not guilty." But if after such impartial consideration of all of

> the evidence you can candidly say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt, and you should find him "guilty" (R. 240).
>
> * * * * *
>
> If there is more than one theory in this case, and if they are equally reasonable, one leading to guilty and the other to innocence, you must adopt the one leading to innocence, because it is safer and better to believe good of a person than to believe evil of him, if you can do so on the basis which is consistent in view of all of the evidence in the case (R. 241).

Petitioner assumes that both courts below were of the view that an instruction defining "reasonable doubt" is "tantamount to the charge of the presumption of innocence" (Pet. 22–23) which is contrary to *Coffin* v. *United States,* 156 U. S. 432 and *Cochran* v. *United States,* 157 U. S. 286. In those cases, this Court held that instructions as to the burden of proof and reasonable doubt are insufficient to advise the jury that the defendant is presumed to be innocent.

We think it is clear that neither the trial court nor the Circuit Court of Appeals in any way departed from the rule of the *Coffin* and *Cochran* cases. They simply took the position that petitioner's requested instruction was adequately cov-

ered in other portions of the charge. In addition to the last three paragraphs of the charge quoted above, which were relied upon by the court below (R. 288), we think the petitioner was plainly given the full benefit of the presumption of innocence by the first paragraph beginning with the sentence: "The fact that this defendant is here under indictment and on trial is not to be taken against him" (R. 238). These instructions are much broader in scope than the familiar definitions of reasonable doubt involved in the *Coffin* and *Cochran* cases, and made it perfectly evident to the jury that petitioner was presumed to be innocent until the contrary was shown. Since the instructions given were adequately equivalent to the "customary formula" (R. 288) embodied in petitioner's requested charge, the refusal to give it was entirely proper, for it is settled that the trial court is not required to phrase its charge in the language of counsel nor to repeat instructions already given in different language (*Agnew* v. *United States*, 165 U. S. 36, 51).

It is true that in so far as petitioner requested the court to charge that the presumption of innocence constituted "evidence in his favor", there are dicta in the *Coffin* and *Cochran* cases to support him. But as the court below pointed out (R. 289), that view has long since been repudiated by this Court. *Holt* v. *United States*, 218 U. S. 245, 253.[1]

[1] See also cases collected in 34 A. L. R. 938; 94 A. L. R. 1042.

The purpose of the presumption is two-fold: On the one hand, it embodies the principle that the prosecution must adduce proof beyond a reasonable doubt (Thayer, *Preliminary Treatise on Evidence,* App. B, pp. 551–553; *Wigmore on Evidence,* Section 2511). In this sense a charge on reasonable doubt would comprehend and render unnecessary a separate charge that defendant was presumed to be innocent. However the more important function of an instruction that the defendant shall be presumed innocent is to overcome so far as is humanly possible the natural inference of guilt arising from the circumstances that the accused has been formally charged with crime, is held in custody, etc. (see Thayer op. cit., *supra,* 561–563, 565). This important thought the trial court in the instant case conveyed to the jury, not in the technical phrase insisted upon by the petitioner—a phrase which "if used to a jury, peculiarly needs to be carefully explained" (Thayer op. cit. *supra,* 566)—but in simple and emphatic terms in the opening sentences of his charge, quoted above. Moreover, as was pointed out in the opinion below (R. 288), the trial court enjoined the jury to believe good rather than evil of the defendant, if the evidence permitted this. We submit that the instructions given went beyond reasonable doubt and burden of proof and gave the petitioner the full benefit of the presumption of innocence.

II

Petitioner's complaint that he was denied a trial by jury on the issue of the statute of limitations is entirely without merit. He was tried and convicted by a jury of twelve, which heard the evidence upon his plea of not guilty (R. 81–82, 245). It was open to the petitioner to prove the defense of limitations under the general issue (*Green* v. *United States,* 154 Fed. 401, 411 (C. C. A. 5th, 1907); *United States* v. *White,* 5 Cranch 73, 86 (C. C. D. C. 1836); see *United States* v. *Cook,* 17 Wall. 168, 179; *United States* v. *Brace,* 143 Fed. 703, 704 (D. C. Cal. 1906); cf. *United States* v. *Murdock,* 284 U. S. 141, 149–151). The plea and replication indicated that the availability of the defense turned on an issue of fact. It was not incumbent upon the trial court to resolve the issue preliminarily (cf. *State* v. *Snyder,* 182 Mo. 462, 503). His determination was limited, as petitioner's counsel made clear (R. 79–80) to the plea in bar and did not preclude a re-trial of the factual issue before the jury (See *State* v. *Hayes,* 162 La. 918, 922; *Thompson* v. *State,* 54 Miss. 740, 743–744; *State* v. *Rook,* 61 Kansas 382, 386). At the trial the government introduced testimony of the petitioner's flight before the petit jury (R. 167, 202–3), which he did not undertake to contradict.

There is, therefore, no need to rest, as the Circuit Court of Appeals did, on the failure of the defendants to object to the trial by the court of the issue of fact raised by the plea in bar. However, if waiver of jury is essential at the prelim-

inary stage, it may be observed that the petitioner was represented by three attorneys at all stages of the proceedings in the trial court (R. 61, 81); that the trial court ruled upon the question after a full hearing (R. 61–80); and that defense counsel at no time presented to the trial court a request for jury trial on the special plea or any objection or exception to the course which was followed. The present objection was not included in the "Grounds of Appeal" (R. 14–45) or the motion for new trial (R. 19–50); it was raised for the first time in the Circuit Court of Appeals. Cf. *Porter* v. *United States*, 91 Fed. 494, 497 (C. C. A. 5th, 1898). We do not believe that *Patton* v. *United States*, 281 U. S. 276 precludes a finding of waiver under circumstances such as these.

III

Petitioner urges that prejudicial errors were committed in the reception of evidence at the trial. In view of the overwhelming evidence of petitioner's guilt, these errors, if errors at all, would not warrant a reversal of the convictions. *United States* v. *Trenton Potteries*, 273 U. S. 392, 404; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 231. No less than six witnesses directly implicated petitioner in the robbery (R. 94, 103, 109, 114–115, 151, 152, 160). From their testimony it unequivocally appears that the petitioner, at the point of a gun, stole the car from which the license plates used on the robbery car were taken, and with a machine gun, robbed the owner of the car used

at the robbery. He left Portland, Maine, the night before the robbery in this car with the two men who have pleaded guilty to committing the robbery. He was positively identified as the man standing alongside the car outside the bank while the robbery was being committed. Late that evening, he stopped at a restaurant in Rochester, Vermont, together with the two confessed robbers of this bank.[2] At the trial, petitioner did not testify in his own behalf, claimed no alibi, and introduced no evidence otherwise to show his innocence.

In the light of this array of evidence, we think that each of these alleged errors were adequately disposed of by the court below (R. 285–287) and certainly present no question worthy of review by this Court.[3]

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[2] Throughout the petition for certiorari the attempt is made to discredit the probity of the Government's witnesses (see esp. 40–46); but, obviously, this is not a matter for consideration by this Court, but one solely for the jury.

[3] With reference to petitioner's contention (Pet. 30) that it was error to permit the Government to impeach Edward Bentz insofar as he testified that petitioner was not involved in the crime, it should be noted that as an eye witness and participant in the crime, he was a "necessary" witness within the well-recognized exception to the rule against impeaching one's own witness. *Litsinger* v. *United States*, 44 F. (2d) 45 (C. C. A. 7, 1930); *Abdo* v. *Townshend*, 282 Fed. 476 (C. C. A. 4, 1922). Therefore, he might have been called "as the court's witness" leaving both sides free to cross examine or impeach. *United States* v. *Ike Young*, 107 F. (2d) 490 (C. C. A. 5, 1939); *Fournier* v. *United States*, 58 F. (2d) 3 (C. C. A. 7, 1932).

CONCLUSION

No special and important reason for the exercise of the discretionary power to review on certiorari has been shown in this case. The petition points to no conflict of decisions and the decision of the Circuit Court of Appeals is correct. We, therefore, respectfully submit that the petition should be denied.

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